in force are precluded from opposing the grant of letters of administration. It follows that my order in this matter must be a direction that letters of administration do issue to the plaintiff.

Unless counsel has anything to urge on the question of costs, I am inclined to think that the costs of these proceedings should be paid by the unsuccessful defendants.

*Order accordingly.*

Solicitors: *K. C. Chan; A. S. Yeo.*

## S. M. AMEER BATCHA v. V. K. KUNJUMON

[A.C.J. (Sutherland J.) March 6, 1958]

[K.L. — Civil Appeal No. 24 of 1957]

*Societies Ordinance, 1949, s. 2(e) — Koottu (Chit Fund) — Whether an Association — Illegality — Administration of funds.*

In this case the plaintiff Ameer Batcha claimed that in November, 1955 he started a *koottu* with ten tickets and a capital of $1,000, each ticket holder subscribing every month $100. The subscriptions were pooled every month and the prize money paid to the lowest bidder, the difference between the pool amount and the bid amount being distributed as premium to the subscribers. Defendant was the successful bidder in February, 1956 and the prize money was paid to him by the plaintiff. Since April, 1956 defendant failed to pay the subscriptions due by him, such subscriptions less the premium amount payable to him amounting to $489.40 and plaintiff prayed judgment for this sum of $489.40.

Defendant pleaded that not having in any way been concerned in the *koottu* as alleged defendant was not liable. Alternatively defendant averred that the plaintiff was not entitled to recover as the *koottu* not being registered was an illegal society.

At the hearing it was contended on behalf of the defendant that the *koottu* based on ten subscribers not being registered was an illegal society under the Societies Ordinance. It was not registered under any Ordinance. It was submitted on behalf of the appellant that even if the society was illegal, the object of the society and the contract between its members may well give rise to civil rights and obligations.

The learned Magistrate, agreeing with the submission of the defence counsel, dismissed the suit. The plaintiff appealed.

**Held:** (1) *koottu* in this case was not carried on for the purpose of the *koottu's* profit, and therefore not carrying on business so as to bring it within exception (e) of the definition of society in section 2 of the Societies Ordinance, 1949;

(2) *koottu* in this case was illegal and does not fall under exception (e) of the definition of society in section 2 of the Societies Ordinance.

*Cases referred to:—*

(1) *Smith v. Anderson,* (1880), 15 Ch. D. 247.

(2) *Ramasamy v. Muniappan,* (1940) M.L.J. 290.

(3) *Greenberg v. Cooper-Stein,* (1926) Ch. 657.

(4) *Jennings v. Hammond,* (1881-82) 9 Q.B.D. 225.

(5) *Shaw v. Benson & Ors.,* (1882-3) 11 Q.B.D. 563.

(6) *Wilkinson v. Levinson,* (1925-26) T.L.R. 97.

MAGISTRATE'S APPEAL.

*P. P. Nair* for the appellant.

*Chan Hua Eng* for the respondent.

**Sutherland J.:** In this case plaintiff claimed that in November, 1955 he started a *koottu* with ten tickets and a capital of $1,000, each ticket holder subscribing every month $100. The subscriptions were pooled every month and the prize money paid to the lowest bidder, the difference between the pool amount and the bid amount being distributed as premium to the subscribers. Defendant was the successful bidder in February, 1956 and the prize money was paid to him by the plaintiff. Since April, 1956 defendant failed to pay the subscriptions due by him, such subscriptions less the premium amount payable to him amounting to $489.40 and plaintiff prayed judgment for this sum of $489.40.

Defendant pleaded that not having in any way been concerned in the *koottu* as alleged defendant is not liable. Alternatively defendant averred that the plaintiff is not entitled to recover as the *koottu* not being registered was an illegal society.

At the hearing counsel for defendant pursued the defence submission that the *koottu* based on ten subscribers not being registered was an illegal society under the Societies Ordinance. It was not registered under any Ordinance. Counsel cited certain authorities, which plaintiff's counsel contended had no application. Plaintiff's counsel urged that civil rights cannot be denied.

The learned Magistrate, agreeing with defence counsel, dismissed this suit, whereupon plaintiff appealed on the grounds set out in his memorandum of appeal.

At the hearing of the appeal appellant's counsel contended that the *koottu* is not a society. He cited the Societies Ordinance, 1949, section 2. Society includes a club, company, partnership or association. The members of the *koottu* have nothing to do with one another, only with the plaintiff. In this respect the *koottu* differs from a society. Counsel referred to

*Smith v. Anderson,*[1] where the Court of Appeal held that the certificate holders did not form an association within the meaning of the Companies Act, 1862, section 4. At page 274 James, L.J., states:

"They are from the first entire strangers who have entered into no contract whatever with each other."

The learned Lord Justice stated that there being nothing in the deed by which any liability could ever be cast upon the certificate holders either as between themselves or as between themselves and anybody else, he could not arrive at the conclusion that the certificate holders form an association within the meaning of the Companies Act, 1862.

I would point out that this authority turns on the interpretation of "association" in the Companies Act, 1862. Also, in section 2 of the Societies Ordinance, "society" does not purport to be completely defined.

In my view the *koottu* in this case is a combination of persons amounting to a society, as was the *kutu* in *Ramasamy v. Muniappan.*[2]

Appellant's counsel however took the matter a step further, urging that even if the *koottu* is a club, company, partnership or association, it is excepted by Exception (e) of the definition of "society" in section 2 of the Societies Ordinance which excepts any company, association, or partnership formed for the sole purpose of carrying on any lawful business.

I will deal with this argument later when considering respondent's submissions on the point. Appellant's counsel cited *Ramasamy v. Muniappan, supra,* where it was held that a collection of 36 people who agreed together each to deposit $5 bi-monthly and who agree to decide by lot that each of them shall have the total amount subscribed in turn was rendered illegal by section 10 of the Societies Enactment as being an unregistered society of more than ten persons.

Appellant's counsel questioned whether what constitutes a society was fully considered in this case. It appears to me however that I should follow this decision unless it can be distinguished. *Stare decisis* is a corner stone of our system of jurisprudence.

Counsel, however, pointed out that the decision is also authority for the proposition that even if a society is illegal, the object of the society and the contracts between its members may well give rise to civil rights and obligations. He cited *Greenberg v. Cooper-Stein,*[3] at page 665 where Tomlin, J. states:

"*Wilkinson* v. *Levinson, Jennings* v. *Hammond,* and *Shaw* v. *Benson*" (which are referred to hereafter) "were all cases where an illegal association was seeking to recover money lent by it; and it was necessarily held that the association being illegal the contract with it could not be enforced by it. It is a different case where those who have subscribed money for an illegal purpose come requiring the agents in whose hands it is and who were to apply it for that purpose and have not done so to return it to them. I am happy to think that the law is not so feeble that it cannot protect the subscribers by ordering an account; but in saying this I am expressing no opinion as to what will take place after the account has been taken....."

I would pause here to emphasise that Tomlin, J., expressly approved *Wilkinson's, Jennings'* and *Shaw's cases,* the facts of which were more in line with the present case than are the facts of *Greenberg's case.* In *Wilkinson's, Jennings'* and *Shaw's cases* an illegal association was seeking to recover money lent by it. *Greenberg's case* was a case of members asking for the return of money paid and I would distinguish *Greenberg's case* from the present case on this ground.

Counsel also referred to *Jennings v. Hammond,*[4] which held that a promissory note given by a member to the trustee of an illegal society to secure a sum of money advanced to such a member under the rules of the society was invalid.

He also cited *Shaw v. Benson & Ors.*[5] which approved *Jennings' case.*

Also cited was *Wilkinson v. Levinson,*[6] that a loan society consisting of more than 20 persons which has not been registered as a company under the Companies (Consolidation) Act 1908 or been formed in pursuance of some other Act and which lends money at interest to its members the profits being shared by the members, is unable by reason of its contravening the provisions of section 1 (2) of the above Act with regard to registration to recover from a member the amount of moneys lent.

Counsel stated that the result of these cases is that the association cannot recover from the members but the members can recover from the association.

This appeared to me to favour defendant-respondent's case. This was not a case of the members recovering from the association.

Counsel urged that the consideration was not unlawful even if the society was unlawful. But it seems to me that under section 24 of the Contracts (Malay States) Ordinance, 1950 if the society is unlawful under section 9 of the Societies Ordinance, 1949 then the consideration

is unlawful, and it further seems to me that the agreement is unlawful *ab initio* and that section 66 of the Contracts (Malay States) Ordinance, 1950 does not apply to it. In my view section 66 of the Contracts (Malay States) Ordinance, 1950 does not apply to this unlawful agreement. Plaintiff is not seeking restoration of an advantage. Counsel for respondent-defendant submitted that the transaction is a lending and borrowing transaction. He further submitted that section 66 of the Contracts (Malay States) Ordinance does not apply to all illegal contracts otherwise contracts made illegal could be circumvented, and I think that there is some force in this submission. Counsel cited in support of his argument *Pollock and Mulla's* Indian Contract and Specific Relief Acts, 6th edition, page 371:

> "The expression 'discovered to be void' presents some difficulty as regards agreements which are void for unlawful consideration. On the one hand it has been said that the words 'agreement discovered to be void' apply to all agreements which are void *ab initio*, including agreements based on an unlawful consideration. If this view be correct it follows that the person who has paid money or transferred property to another for an illegal purpose can recover it back from the transferee under this section, even if the illegal purpose is carried into execution and both the transferor and the transferee are in *pari delicto*. It is difficult to suppose that such a result was contemplated by the legislature. Moreover it would not be correct to say that where a person gives money for an unlawful purpose the agreement under which the payment is made can be on his part discovered to be void.....it seems on the whole that the present section does not apply to agreements which are void under section 24 by reason of an unlawful consideration or object and there being no other section in the Act under which money paid for an unlawful purpose may be recovered back the analogy of English law will be the best guide."

I respectfully agree with this passage. As to the English law, I would refer to *Halsbury's* Laws of England, 2nd edition, volume 7 at p. 174:

> "Money paid in pursuance of an illegal contract can be recovered so long as the contract remains executory."

As to section 2 of the Societies Ordinance, counsel contended that this association does not come within the exception (e) because it is not carrying on business, i.e. trade with a view to profit. He asked whether a *koottu* could be termed a business without distorting the word business. He submitted that a *koottu* was not a business.

The question as to whether the *koottu* in this case is carrying on a business depends on the inference to be drawn from the facts. It has been said that an ounce of fact is worth more than a ton of law: I would prefer to express the notion as an ounce of fact will outweigh a ton of law. After mature consideration it appears to me that the *koottu* is not carried on for the purpose of the *koottu's* profit, and in my view is not carrying on a business so as to bring it within the exception (e) to the definition of society. In this regard I would respectfully agree with the judgment of Horne, J., in *Ramasamy's case, supra*, that the *kutu* in that case was illegal and I would similarly say that the *koottu* in this case is illegal. In my view the *koottu* does not fall under exception (e) of the definition of society in section 2 of the Societies Ordinance.

In the result, I am of the view that the learned Magistrate's dismissal of the claim was correct and I confirm it and dismiss the appeal with costs.

*Appeal dismissed.*

Solicitors: *P. P. Nair; Shearn Delamore & Co.*

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## Re R. E. COLOMB, DECD.
## G. E. COLOMB v. R. E. COLOMB & ORS.

[O.C.J. (Shepherd J.) April 1, 1958]

[K.L. — Originating Summons No. 152 of 1957]

*Will — Construction of — Omission — Necessary implication of intention — Adopted children — Partial intestacy — Domicile in Selangor — Distribution Enactment (Cap. 71).*

This was an application by the widow of the deceased asking for directions on several points arising out of the proper construction of the will of her late husband. The testator died domiciled in Selangor on December 29, 1949 having made a will, which might be described as a home-made will. The will was made on September 14, 1947. After appointing the applicant and the Public Trustees (who had renounced) as executors until such time as any one or more of his "sons" could come in and prove, the testator proceeded to devise his immovable property in the following terms: "I give and bequeath, unto my wife, Gladys Elaine and my adopted children, Ronald Evelyn, Spencer Roy and Della Elaine, 20% each, and to my sisters, Ivy Eveline Ruth and Rosalind May, 10% each as portions of my immovable property, to be finally divided after the last mentioned child, Della Elaine, attains the age of maturity or completion of her studies whichever is later." There followed a provision directing the executors, until the date of distribution, to collect and distribute the income from such immovable property in a particular way. The way indicated was the creation and maintenance of "a small reserve in any Savings Bank" for incidental expenses (which were specified) connected with the maintenance of such property. There followed a provision directed to the